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Supreme Court, U.S.
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In the OFFICE OF THE CLERK

Supreme Court of the United States

FAZAL MAHMOOD DADA, MOHAMMAD IBRAHIM DADA, AZEEM FAZAL DADA,

Petitioners,

v.

ERIC H. HOLDER, JR., United States Attorney General,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Petitioners are citizens of Pakistan. They were represented by counsel in their removal proceedings. Their first attorney had a stroke, and was unable to continue representing them. About a week before their asylum hearing, their attorney arranged for another attorney to take over the case. This attorney moved for a continuance because the previous attorney had not submitted any documents and he required time to prepare. The Immigration Judge (IJ) denied the continuance, then denied Petitioners' claims, finding the lead Petitioner not credible, in part due to the lack of supporting documents. Petitioners appealed to the BIA, then petitioned for review in the Court of Appeals. They also moved to reopen their case based on changed country conditions. The BIA denied their motions based on extra record facts which the BIA took administrative notice of without first advising Petitioners and giving them an opportunity to address the noticed facts. Petitioners appealed this decision, but the consolidated petitions were denied.

The questions presented are:

1. Whether the IJ's denial of a continuance was improper in light of the effect that it had on Petitioners' ability to present their claim and their right to representation in removal proceedings.

2. Whether the BIA's denial of Petitioners' motion based on administratively noticed facts without giving Petitioners notice or an opportunity to respond to those facts was an abuse of discretion and a violation of due process.

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The Summary Order of the Court of Appeals is reported at *Dada v. Holder*, 361 Fed. Appx. 254 (2d Cir. 2010), *1a*. The denial of rehearing on May 19, 2010, is unreported (*see* 2d Cir. docket numbers 05-6291; 08-5158), *37a*. The decisions of the Board of Immigration Appeals (BIA), *8a*, *12a*, and the Immigration Judge (IJ), *18a*, *34a*, are unreported.

JURISDICTION

The Court of Appeals denied Petitioner's Petition for Review on January 21, 2010. Petitioners timely filed a Motion for Rehearing and Rehearing *en banc*, which was denied by an order of the court on May 19, 2010. The jurisdiction of the Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTORY AND REGULATORY PROVISIONS

8 C.F.R. § 1003.29:

> Continuances. The Immigration Judge may grant a motion for continuance for good cause shown.

8 U.S.C. § 1229a(c)(7):

> (7) Motions to reopen.
>
> (A) In general. An alien may file one motion to reopen proceedings under this section, except that this limitation shall not apply so as to prevent the filing of one

motion to reopen described in subparagraph (C)(iv).

(B) Contents. The motion to reopen shall state the new facts that will be proven at a hearing to be held if the motion is granted, and shall be supported by affidavits or other evidentiary material.

(C) Deadline.

(i) In general. Except as provided in this subparagraph, the motion to reopen shall be filed within 90 days of the date of entry of a final administrative order of removal.

(ii) Asylum. There is no time limit on the filing of a motion to reopen if the basis of the motion is to apply for relief under sections 208 or 241(b)(3) and is based on changed country conditions arising in the country of nationality or the country to which removal has been ordered, if such evidence is material and was not available and would not have been discovered or presented at the previous proceeding.

STATEMENT OF THE CASE

Petitioners are citizens of Pakistan. Mohammad Ibrahim Dada and Azeem Fazal Dada are the sons of Fazal Mahmood Dada.[1] Petitioners entered the U.S. with a visitor's visa on July 6, 1997, and were authorized to remain until January 5, 1998. Mr. Dada applied, with the aid of an attorney, for a change of status to L-1 classification,[2] and he and his sons were granted permission to remain in the U.S. through December 15, 1999. Mr. Dada applied for an extension, but his application was denied. Mr. Dada, through counsel, also filed an application for Foreign Labor Certification, but that application was denied. Mr. Dada subsequently began the process of applying for lawful permanent residence under INA § 245(i). That application remains pending today.

Petitioners appeared for their first hearing before the IJ on April 18, 2003, after which the IJ adjourned the matter until September 12, 2003 so Petitioners could find an attorney. At the hearing on September 12, 2003, Petitioners appeared, represented by Mr. Efren B. Abella. At this hearing, the IJ took the pleadings, and Petitioners indicated that they would be seeking withholding of removal as relief from removal. Petitioners' attorney requested a few weeks to prepare the application,

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[1] The proceedings of Fazal Dada's sons were consolidated with Mr. Dada's proceedings. Their claims before the IJ were entirely dependant on Mr. Dada's claims.

[2] *See* INA § 101(a)(15)(L).

and the IJ adjourned the hearing until February 27, 2004.

On February 27, 2004, Petitioners appeared *pro se*. Mr. Abella's office provided a letter stating that he was unable to attend and would be unable to appear for three months because he suffered a stroke. Instead of the indicated three months, the IJ adjourned the hearing for three weeks, until March 19, 2004.[3] The IJ instructed Petitioners that they had to appear, with or without a lawyer, and advised them to hire another lawyer for the day. The IJ stated that the next hearing would be for pleadings and an attorney, and that he would proceed with or without a lawyer for Petitioners.

Petitioners appeared on March 19, 2004, represented by Mr. Albert Lefkowitz, appearing of counsel for Mr. Abella. The IJ noted that the pleadings had been conducted previously, and that Petitioners would be seeking asylum. Petitioners filed their applications and the IJ set the case for an individual hearing on August 3, 2004. Mr. Lefkowitz indicated that this date was acceptable. The IJ did not set a deadline for the submission of documents in support of the application, or mention that any documents should be filed.

On July 27, 2004, Petitioners' new attorney, Mr. Ramesh Shrestha, filed a request for a

[3] As a reason for the short adjournment, the IJ stated that the cases had been pending since April 18, 2003, and the pleadings had not yet been taken. This was an inaccurate statement, as the pleadings had been taken at the prior hearing.

continuance. The request stated that Petitioners had been represented by Mr. Abella, who was unable to continue with the case,[4] and who had made arrangements with another attorney (Lefkowitz) to take over the case, but he had problems following up with the case and wanted Mr. Shrestha to take over. Unfortunately, Mr., Abella had only contacted Mr. Shrestha the previous week, and Mr. Shrestha had first received the file and interviewed Petitioners on July 26, 2004 at 5 pm.

The request stated that Mr. Shrestha had reviewed the file and found that the applications for asylum had been submitted, but no supporting documents had been submitted in the case. Mr. Shrestha indicated that Mr. Dada had never been informed of the need to submit supporting documents prior to the hearing, and that Mr. Dada stated that he could obtain documents to support his claim.

Mr. Shrestha stated that the case was not ready for a merits hearing, and that he did not feel comfortable as an attorney going forward with the case when not a single supporting document had been filed. He then requested a continuance for the purposes of submitting documents. He also noted that he had another hearing scheduled for the same date as Petitioners' hearing, and asked for an

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[4] As a result of his stroke, Mr. Abella was ultimately suspended from practice due to mental incapacity on November 27, 2006 by the N.Y. Sup. Court, App. Div., 2d Dep't. The transcript indicates that the IJ was aware of Mr. Abella's infirmity and the surrounding circumstances.

adjournment in light of the conflict. Mr. Shrestha also asked for a continuance based on the fact that he needed time to prepare. He requested that the proceedings be adjourned for three months.

In a written decision dated July 29, 2004, the IJ denied Petitioners' request for a continuance. The IJ found that the case had been on since April 2003, these were expedited asylum cases, and Petitioners had been given ample time to prepare and obtain documents. The IJ stated that if the court deemed more evidence to be necessary, a document submission date could be established. *35a*.

The IJ also stated that he was unsympathetic to Mr. Shrestha's scheduling conflict or need to prepare for the hearing. The IJ noted that he had set aside time for the hearing and requested an interpreter, and stated that Mr. Shrestha should have declined to represent Petitioners if he knew he had a scheduling conflict and was not prepared to proceed. The IJ then stated that he had been very patient and had continued the case several times based on Mr., Abella's illness.[5] The IJ then stated that he had warned Petitioners at the previous hearing that he would proceed without counsel if they were unable to obtain a lawyer for the hearing, and that Petitioners should have secured legal counsel within sufficient time of the hearing if they wished to be represented. The IJ then found that there were no valid reasons to grant a continuance. *35a*.

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[5] This is not an accurate statement. The IJ continued the case only once due to Mr. Abella's illness.

Petitioners appeared at their individual hearing on August 3, 2004, represented by Mr. Shrestha. Mr. Dada testified in support of his claim.

Mr. Dada testified that he became a member of the Pakistan People's Party (PPP) in 1995, when he took over for his father, who had been involved in politics. Petitioner testified that he was the General Secretary of the Central Zone, Karachi.

Mr. Dada testified that the leader of the PPP in 1971 was Zulfikar Ali Bhutto, the father of Benazir Bhutto. Mr. Bhutto was Prime Minister of Pakistan from 1972 to 1977, when he was ousted by a military coup. Mr. Dada testified that Mr. Bhutto was hanged in 1977 by the military government. In 1988, Benazir Bhutto was elected Prime Minister for the first time. However, the PPP was ousted in 1990 by the Pakistan Muslim League (PML), and Nawaz Sharif became Prime Minister. Ms. Bhutto again became Prime Minister in 1993, only to be displaced again by Sharif and the PML- aided by the military- with the dissolution of the government on November 5, 1996, after which Ms. Bhutto was forced to flee the country to avoid false charges against her. Her husband, Asif Ali Zardari, a friend and schoolmate of Mr. Dada, was arrested and held on false charges by the army.

Mr. Dada testified that he had problems in Pakistan as a result of his political activities. He testified that on March 27, 1996,[6] while he was

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[6] Mr. Dada testified that he was not sure of the date because he was not feeling well and had not been feeling well for some

returning from a party meeting, he was attacked by a man driving a truck who fired a gun at him. Mr. Dada reported the incident to the police, but the police refused to take a report and instead told him he should give up politics or suffer the consequences.

Mr. Dada also testified that he was arrested while returning from a party meeting. The police detained and beat him for three days. They said they would only release him on the condition that he testify in support of the false charges against Mr. Zardari. Mr. Dada testified that this happened three or four months before he left Pakistan, in March or April 1997.[7]

Mr. Dada testified that when he was released, he made a plan to come to the U.S. Although nothing happened in the time between his release and his departure, his family informed him that police came looking for him at his home and at his business after he left. Mr. Dada testified that he feared returning to Pakistan because he would be arrested and because the military was against democracy and because he had not testified falsely against Mr. Zardari.

When Mr. Dada was asked why he had not filed his asylum application when he first came to the U.S., he stated that he had consulted with an attorney who advised him to apply for a business visa. When his renewal was denied, he believed he

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time. His application states that the date of this incident was March 27, 1997.

[7] According to his application, the date was April 5, 1997.

could obtain lawful status through INA § 245(i), and thus never applied for asylum. When asked why he did not provide any documents in support of his application, he stated that he tried to contact his lawyer many times, but was never told that he needed to provide any documents.

At the conclusion of the hearing, the IJ denied Petitioners' claims. *See 18a-33a.* The IJ found that Mr. Dada was not credible due to his lack of clarity on the dates of the incidents he testified to, and the inconsistency between his application and testimony regarding the dates. The IJ also based his finding on the fact that Mr. Dada testified that his arrest occurred when he was returning from a meeting, but his application says it occurred when he was returning from a rally.[8] The IJ found it implausible that Mr. Dada did not know that he was required to submit documents in support of his claim in light of the fact that he was educated and had applied for a visa and labor certification previously. The IJ found that the lack of corroborating evidence submitted by Mr. Dada further undermined his credibility in light of his confusion about the dates. The IJ also stated that Mr. Dada had not submitted any documentation of his health problems and why they would affect his

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[8] Earlier in the transcript, the interpreter had indicated confusion over the term "rally." When pressed on the discrepancy between his application and testimony over where he had been prior to his arrest, Mr. Dada stated that he was uncertain about the exact dates of the events. Mr. Dada (or the interpreter) appears to have been confused about whether the IJ was asking about the date of the events or the location of the events, and it is an open question whether the interpreter understood what a rally is.

memory.[9] The IJ found that Mr. Dada's failure to file his application within one year of his entry made his application time barred, and also undermined the credibility of his fear of returning to Pakistan.

The IJ further found that circumstances had changed in Pakistan with the election of the PML in 2002, and that the military was no longer in control. This made Petitioners' fear of persecution unreasonable, as it was the military government that was in power when Mr. Dada was attacked, arrested and left Pakistan, and Mr. Dada no longer had a valid fear of persecution.[10] The IJ did not set a document submission date.

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[9] The IJ found that his problems were a result of shingles, but there is no discussion in the record of whether Mr. Dada suffered from shingles.

[10] The IJ's decision is not supported by history. Sharif and the PML were ousted in a military coup by General Pervez Musharraf in 1999. In 2001, Musharraf appointed himself President. On April 30, 2002, Musharraf's presidency was extended by five years. A return to a civilian government occurred with elections in 2002, however, Musharraf remained the President and the leader of the military. In 2004, Musharraf declined to relinquish his military leadership, and in fact maintained control over the government through 2008. Thus, from 1999 until 2008 the military had a direct involvement in the government of Pakistan. Further, prior to 1999, the military and PML appear to have consistently maintained some form of alliance against the PPP, such that there was military involvement in the government even during periods of PML rule. *See* U.S. Dep't of State, Background Notes: Pakistan, *available at* http://www.state.gov/r/pa/ei/bgn/3453.htm.

The BIA affirmed the decision of the IJ, finding no error in the IJ's denial of asylum, withholding and relief under the CAT. *9a-10a*. There is no mention of the IJ's credibility finding or his denial of the continuance in the BIA's decision. The BIA found that the testimony of Mr. Dada alone was insufficient to carry his burden of proof, and that the IJ had reasonably denied the applications for a lack of corroborating evidence. The BIA affirmed the IJ's finding that there had been a change in country conditions such that Petitioners no longer had a well founded fear of persecution. Petitioners appealed to the Court of Appeals for the Second Circuit.

Petitioners filed a motion to reopen with the BIA on May 7, 2008 based on changed country conditions in Pakistan. Petitioners' motion was based on events in Pakistan beginning in March 2007, when General Musharraf suspended the judiciary, then dissolved the government and imposed marshal law in November 2007. Subsequently, during a period of growing anti PPP violence, Benazir Bhutto, leader of the PPP (and wife of Mr. Dada's friend, Asif Ali Zardari), was assassinated by rival political factions on December 27, 2007. This resulted in a period of escalating political violence and violent crackdown by security forces. Although elections were held in February 2008, Musharraf remained President until his resignation on August 18, 2008 (after Petitioners filed their motion), and the future of the resulting coalition government is far from certain.

Petitioners' motion was also based on the rise of fundamentalist Islamic groups, and the fear that

Mr. Dada's sons will be persecuted at their hands. The motion was supported by substantial documentation,[11] including news reports, affidavits, a letter stating Mr. Dada's membership in the PPP, and an expert affidavit.

On September 24, 2008, the BIA denied Petitioners' motion, finding it time barred and finding that Petitioners failed to demonstrate changed country conditions. The BIA found that many of Petitioners' documents were not previously unavailable, and found that Petitioners' fear of Islamic fundamentalists did not justify reopening. *12a-17a.*

In reaching its decision, the BIA took administrative notice of a New York Times article of September 6, 2008[12] stating that Musharraf had resigned, the PPP had formed a coalition government,[13] and Asif Ali Zardari had been elected President. The BIA found that in light of these events, Petitioners did not have a well founded fear of persecution in Pakistan. Petitioners were not afforded notice that the BIA would be relying on this article or the facts contained therein, or an opportunity to respond to the article or the noticed

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[11] The motion to reopen materials occupy more than 200 pages.

[12] http://www.nytimes.com/2008/09/07/world/asia/07zardari.html.

[13] Ironically, the coalition was formed with Nawaz Sharif and the PML-N. However, the article notes that that coalition collapsed in August 2008, and noted continuing differences.

facts before the BIA denied the motion. Petitioners appealed this decision to the Second Circuit.

On January 21, 2010, the Court of Appeals denied the petitions for review of the BIA's decisions. *1a-7a*. The Court upheld the IJ's adverse credibility finding and found that the IJ had reasonably held that the lack of corroborating documents undermined Mr. Dada's credibility. The Court then found that the IJ's denial of Petitioners' request for a continuance was not an abuse of discretion.

Regarding Petitioners' motion to reopen, the Court held that the BIA had reasonably concluded that Petitioners had either failed to submit new and previously unavailable evidence, or their evidence did not demonstrate a material change in country conditions. Further, the Court found that Petitioners' due process rights had not been violated by the BIA's administrative notice of conditions in Pakistan because this had not been the sole basis for the BIA's decision. Petitioners sought rehearing of this decision, but it was denied on May 19, 2010.

ARGUMENT

I. WHEN AN IJ'S DENIAL OF A CONTINUANCE IS AN ABUSE OF DISCRETION BECAUSE IT IMPACTS AN ALIEN'S RIGHT TO COUNSEL OR ABILITY TO PRESENT HIS CLAIMS IS AN ISSUE THAT HAS RECEIVED INCONSISTENT TREATMENT FROM THE COURTS.

This case involves an issue of exceptional importance which has received inconsistent treatment within the Courts of Appeals. This question is: when is an IJ's denial of a continuance an abuse of discretion because it violates an alien's right to a reasonable opportunity to present his claim or his right to counsel?[14]

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[14] Petitioners below primarily phrased their arguments in terms of a deprivation of their right to present evidence on their behalf, however, they argue that this resulted at least in part from their attorney's inability to prepare and submit evidence on their behalf. Although Petitioner's right to counsel claim perhaps could have been more fully stated below, the claim is both exhausted and incorporated into the due process claim. *See Ponce-Leiva v. Ashcroft*, 331 F.3d 369, 373-74 (3d Cir. 2003) ("First, the due process claim is inextricably linked with the immigration judge's denial of the continuance request. Ponce-Leiva's assertion that his right to counsel was violated is based solely on the immigration judge's decision to deny the continuance request. While it would have been preferable for Ponce-Leiva to have taken greater pains in equating the denial of the continuance request with the violation of his due process rights, the two claims are one and the same.").

A. The current lack of uniformity relating to Due Process, the Right to Present a Claim, the Right to Counsel, the Abuse of Discretion Standard, and the Denial of a Continuance.

Aliens in removal proceedings are entitled to due process of law under the Fifth Amendment. *Reno v. Flores*, 507 U.S. 292, 306 (1993). "The Fifth Amendment's due process clause mandates that removal hearings be fundamentally fair." *Al Khouri v. Ashcroft*, 362 F.3d 461, 464 (8th Cir. 2004).

Due process takes on a greater significance in cases where an alien is seeking asylum, withholding of removal, and relief under the CAT, as by nature these cases involve an alien's fear of persecution or torture in their homelands. *See Wong Yang Sung v. McGrath*, 339 U.S. 33, 50, (1950). Further, asylum, withholding and CAT cases implicate our Nation's obligations under treaty and international law, and some courts have even recognized a liberty interest under the Constitution in being able to petition the government for protection under these laws. *See Haitian Refugee Center v. Smith*, 676 F.2d 1023, 1038 (5th Cir. 1982).

Due process under the Fifth Amendment requires that an alien in removal proceedings have a "right to a full and fair presentation of his claim." *Lin v. Ashcroft*, 377 F.3d 1014, 1025 (9th Cir. 2004). In addition, aliens in removal proceedings have a statutory right to a reasonable opportunity to present their claims. *See Baires v. I.N.S.*, 856 F.2d 89, 91 (9th Cir. 1988); 8 U.S.C. § 1229a(b)(4)(B).

Aliens in removal proceedings also have a statutory right to be represented by counsel at no expense to the government. 8 U.S.C. § 1229a(b)(4)(A). Some courts have also found a due process right to counsel under the Fifth Amendment. *See Ponce-Leiva v. Ashcroft*, 331 F.3d at 374 ("aliens have both a statutory and a constitutional right to counsel"). *But c.f. Matter of Compean*, 24 I&N Dec. 710, 714 (A.G. 2009)[15] (no constitutional right to counsel or effective assistance of counsel) *vacated by* 25 I&N Dec. 1 (A.G. 2009) (without reaching constitutional issues). Several courts have also found that an alien's right to counsel may be central to his ability to fairly present his claims. *See e.g. Leslie v. AG of the U.S.*, 2010 U.S. App. LEXIS 13952, at 24 (3d Cir. 2010) ("A proceeding may be fundamentally unfair if an alien is prevented from reasonably presenting his case, and we have held that the right to counsel is 'so fundamental to the proceeding's fairness that a denial of that right could rise to the level of fundamental unfairness.'") (*citation omitted*).

By regulation, an IJ may grant a continuance of a removal proceeding for good cause. 8 C.F.R. §§ 1003.29; 1240.6. However, the regulations do not define "good cause." The courts review the IJ's denial of a continuance under the abuse of discretion standard.[16] However, this is a case by case inquiry,

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[15] *Compean I* details the Circuit split over the question of whether the Fifth Amendment provides a right to effective assistance of counsel in removal proceedings. *Id.*, at 718-720.

[16] Although some courts have held that they lack jurisdiction to review the denial of a continuance. *See Yerkovich v. Ashcroft*,

See Ponce-Leiva v. Ashcroft, 331 F.3d at 377, a fact that has led to significant inconsistencies in the treatment of the issue by the courts. Importantly, the courts are also split over the question of when an IJ's denial of a continuance violates an alien's right to due process, right to counsel, or right to present his claims. There is often substantial overlap between these issues and the abuse of discretion standard, which contributes to the lack of a clear legal standard.

"An abuse of discretion may be found in those circumstances where the Board's decision provides no rational explanation, inexplicably departs from established policies, is devoid of any reasoning, or contains only summary or conclusory statements; that is to say, where the Board has acted in an arbitrary or capricious manner." *Zhao v. DOJ*, 265 F.3d 83, 93 (2d Cir. 2001) (*internal citations omitted*). The BIA also abuses its discretion when its "decision – though not necessarily the product of a legal error or a clearly erroneous factual finding - cannot be located within the range of permissible decisions." *Morgan v. Gonzales*, 445 F.3d 549, 551-52 (2d Cir.2006). "Moreover, aliens are entitled by statute and regulation to certain specified procedural protections. In particular, they have the statutory right to be represented by counsel of their choice, at no expense to the government. In addition, they are guaranteed a reasonable opportunity to present evidence in their own behalf." *Baires v. I.N.S.*, 856 F.2d at 91 (*citations omitted*).

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381 F.3d 990, 995 (10th Cir. 2004). *But c.f. Kucana v. Holder*, 130 S. Ct. 827, 840 (2010).

"Denial of these statutory rights may constitute an abuse of discretion requiring remand." *Id.* Additionally, where an IJ bases a discretionary decision on a mischaracterization of the facts or an erroneous legal standard, the decision may also constitute an abuse of discretion. *See Gui Yin Liu v. INS*, 475 F.3d 135, 138 (2d Cir.2007).

While aliens have a right to a reasonable opportunity to present their claims and present evidence on their behalf, there is no clear standard on the question of when an IJ's denial of a continuance amounts to an abuse of discretion because it interferes with this right. The BIA has held that in order to show that the denial of a continuance based on a need for preparation or to submit additional evidence was erroneous, an alien "must make a reasonable showing that the lack of preparation occurred despite a diligent good faith effort to be ready to proceed and that any additional evidence he seeks to present is probative, noncumulative, and significantly favorable to the alien." *Matter of Sibrun*, 18 I. & N. Dec. 354, 356 (BIA 1983). The BIA further held that "an immigration judge's decision denying the motion for continuance will not be reversed unless the alien establishes that that denial caused him actual prejudice and harm and materially affected the outcome of his case." *Id.*, at 356-57. However, this test for reversing the denial of a continuance has not been adopted in a single published court decision.[17]

[17] Parts of this test have been adopted in a small number of unpublished decisions of the Fifth and Eleventh Circuits, *see e.g. Musyoki v. Gonzales*, 234 Fed. Appx. 239, 239 (5th Cir.

At least one court has indicated that the argument that a denial of a continuance violated an alien's right to present his claims was equivalent to arguing that the IJ abused his discretion. *De La Cruz v. U.S. INS*, 951 F.2d 226, 229 N.4 (9th Cir. 1991).

"While it is clear that aliens have both a statutory and a constitutional right to counsel,[18] it is unclear how the two relate to each other. Courts of appeals have presented this relationship in different ways." *Ponce-Leiva v. Ashcroft*, 331 F.3d at 374. The Ninth Circuit has found that a showing of significant prejudice is required to find a due process violation. *Castro-O'Ryan v. U.S. Dep't. of Immigration and Naturalization*, 847 F.2d 1307, 1313 (9th Cir. 1988). Other courts have found that the denial of an alien's statutory right to counsel, even without a showing of prejudice, may constitute reversible error. *See Leslie v. AG of the U.S.*, 2010 U.S. App. LEXIS 13952, at 16.

"[T]he mere inability to obtain counsel does not constitute a violation of due process," *U.S. v. Torres-Sanchez*, 68 F.3d 227, 231 (8th Cir. 1995), but an IJ must give an alien a reasonable amount of time to find an attorney. *Biwot v. Gonzales*, 403 F.3d 1094, 1098-99 (9th Cir. 2005). There is no consensus on what constitutes a reasonable time. Further, the courts have held that an alien may waive his right to counsel, but "for an applicant to

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2007); *Salcedo-Mora v. U.S. AG*, 338 Fed. Appx. 814, 815 (11th Cir. 2009), however, it is not generally accepted.

[18] *But see Compean, supra.*

appear *pro se*, there must be a knowing and voluntary waiver of the right to counsel." *Tawadrus v. Ashcroft*, 364 F.3d 1099, 1103 (9th Cir. 2004) (*citation omitted*). "To obtain a knowing and voluntary waiver of the statutory right to counsel, the IJ must '(1) inquire specifically as to whether petitioner wishes to continue without a lawyer; and (2) receive a knowing and voluntary affirmative response.'" *Mendoza-Mazariegos v. Mukasey*, 509 F.3d 1074, 1080 (9th Cir. 2007) (*citations omitted*).

The question becomes more complex when the IJ's actions prevent the alien's attorney from providing effective assistance. Some courts have found reversible error, *see e.g. Lin v. Ashcroft*, 377 F.3d at 1033 (IJ erred when he "chose to proceed with the long-delayed hearing by insisting that an obviously unprepared counsel, who by her own assertion had not expected to argue this case, represent [the alien]"), however, others have not. *See e.g. Ponce-Leiva v. Ashcroft*, 331 F.3d at 376 (IJ's denial of a continuance not an abuse of discretion when alien "was represented, and counsel knew of his obligations. Counsel's failure to discharge his duties did not mean that Ponce-Leiva's 'right to counsel' was violated; Ponce-Leiva was simply the victim of poor lawyering.").[19]

In assessing whether the denial of a continuance violates an alien's rights or is an abuse of discretion, the courts have typically weighed the reasonableness of denying the continuance against

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[19] *But c.f. Contla v. AG of the U.S.*, 2010 U.S. App. LEXIS 13947, at 5-6 (3d Cir. 2010) (*unpub.*)

the impact on the alien's right to counsel and her right to present her claims. The BIA has noted an "inherent tension between the conflicting needs to bring finality to the removal proceedings and to give the respondent an opportunity to apply for relief." *Matter of Hashmi*, 24 I. & N. Dec. 785, 787 (BIA 2009). In fact, in almost all cases, the IJ's denial of a continuance is based, at least in part, on the need to expeditiously conclude the proceedings. However, "[t]o reach a decision about whether to grant or deny a motion for a continuance based solely on case-completion goals, with no regard for the circumstances of the case itself, is impermissibly arbitrary." *Hashmi v. AG of the U.S.*, 531 F.3d 256, 261 (3d Cir. 2008). The courts have cautioned that "aliens' statutory rights in deportation proceedings must be respected and that the desire for expeditious handling of immigration cases cannot, in itself, justify the evisceration of those rights." *Baires v. I.N.S.*, 856 F.2d at 93.

Different courts have considered different factors, but among the factors considered are the number, length and purpose of prior continuances, *Baires v. I.N.S.*, 856 F.2d at 93; the party to which the delays are attributable, *Al Khouri v. Ashcroft*, 362 F.3d at 464; bad faith on the part of the alien, *Baires v. I.N.S.*, 856 F.2d at 93; the inconvenience to the court or cost to the government of the delay, *Id.*, at 92; *Lin v. Ashcroft*, 377 F.3d at 1033; the alien's diligence in pursuing her claims, *Mendoza-Mazariegos v. Mukasey*, 509 F.3d at 1080; and occasionally, the merits of the underlying claim.

Ponce-Leiva v. Ashcroft, 331 F.3d at 377.[20] Some courts have required a showing of prejudice to find an abuse of discretion or violation of due process, *See U.S. v. Torres-Sanchez*, 68 F.3d at 230 (hearing cannot be fundamentally unfair unless there is prejudice), while others have found that once an abuse of discretion or violation of an alien's rights is established, a showing of prejudice is required for a remand. *Lin v. Ashcroft*, 377 F.3d at 1027; *but c.f. Picca v. Mukasey*, 512 F.3d 75, 78 (2d Cir. 2008) (if agency violates regulation intended to protect alien's right to counsel, no prejudice required).

One court has held that in "deciding whether denial of the alien's request [for continuance] would violate his statutory right to a reasonable opportunity to present evidence in his own behalf, the judge must consider the nature of the evidence to be presented and its importance to the alien's claim." *Baires v. I.N.S.*, 856 F.2d at 92. Other courts have noted that in asylum cases, "the IJ has an affirmative obligation to help establish and develop the record in the course of such proceedings," *Secaida-Rosales v. I.N.S.*, 331 F.3d 297, 306 (2d Cir. 2003), and weighed this factor in assessing the IJ's denial of a continuance. *Al Khouri v. Ashcroft*, 362 F.3d at 465.

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[20] *But see Ponce-Leiva v. Ashcroft*, 331 F.3d at 385 N. 7 (*Rendell, J., dissenting*) ("The majority did, however, note that the immigration judge can take the "merits" into account in determining whether a continuance should be granted. But exploring and judging the "merits" absent assistance of, and explication and advocacy from, counsel, would appear only to exacerbate the denial of the right.").

B. By denying a continuance, the IJ abused his discretion and violated Petitioners' right to due process, right to counsel, and right to fairly present their claims.

In the instant case, Petitioners' counsel moved for a continuance in light of the fact that he had been retained less than a week before the hearing, no supporting documents had been filed, and, in his view, the case was not ready for a merits hearing. Mr. Shrestha stated that Petitioners had not been informed by prior counsel of the need to file documents, and that the reason for his late retention was due to prior counsel's health and inability to keep up with the case. Mr. Shrestha also stated that he needed time to prepare.[21]

The IJ denied the continuance, stating that the case "has been pending since April, 2003 and [Petitioners] have had more than ample time to prepare and obtain documents for their hearing." *35a.* The IJ noted that the cases were expedited asylum matters, and that "[i]f at the conclusion of the hearing and the court deems additional evidence is necessary, then an evidence submission date can be established for the submission of additional materials." *Id.* As for Mr. Shrestha's scheduling conflict and need for time to prepare, the IJ was "not sympathetic to the counsel situation since he was on notice that these cases have been scheduled for a full

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[21] Mr. Shrestha also cited a scheduling conflict, but as he appeared on the day of the hearing, we are forced to conclude that he made alternate arrangements in his other cases.

merits hearing." *Id.* The IJ noted that he had set aside time for the hearing and arranged to have an interpreter present, and stated that if Mr. Shrestha knew he had a scheduling conflict, "then counsel should have declined to represent the [Petitioners] due to his prior commitment to other matters and his unavailability to proceed." *Id.* The IJ further stated that

> "the court has been extremely patient and has continued the matters several times based on prior counsel's unavailability due to illness. The court informed [Petitioners] at the last hearing date that it will proceed without counsel. If [Petitioners] desired legal counsel for their hearing, then they were put on notice to secure counsel in sufficient time for the hearing. Consequently, there are no valid reasons to continue the matter."

Id. The Second Circuit[22] found that the IJ's denial of the continuance was not an abuse of discretion because

> "Dada's case had been pending for over a year; Dada had ample time to prepare and obtain documents; his new counsel was on notice that the case was scheduled for a full merits hearing, an interpreter had already been arranged; and the IJ

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[22] Oddly, although raised before the BIA, the continuance was not addressed in its decision.

> had continued the matter several times in the past."

See 6a. However, this holding is flawed, and conflicts with decisions of other courts.

As an initial matter, the IJ incorrectly stated that he had continued the case several times due to Mr. Abella's illness. He had continued the case only once for this reason, and only for three weeks. *See Biwot v. Gonzales*, 403 F.3d at 1098-99 ("To infuse the critical right to counsel with meaning, we have held that IJs must provide aliens with reasonable time to locate counsel and permit counsel to prepare for the hearing."). Thus, the IJ's denial of a continuance was, at least in part, based on a misperception of the record.

The IJ failed to consider two critical factors in Petitioners' request for a continuance: Petitioners had not been informed of the need to submit documents, and Mr. Abella, not Petitioners, had contacted Mr. Shrestha about taking over the case. If Petitioners were unaware of the fact that they needed to submit documents until they met with Mr. Shrestha, then they did not have ample time. Similarly, although IJ found that Petitioners had been on notice that they needed to retain counsel within sufficient time of the hearing, there is no indication in the record that they knew that neither Mr. Abella nor Mr. Lefkowitz would be representing them until they met with Mr. Shrestha a week before the hearing. Thus, while they may have had ample notice of the hearing date, they may not have had notice of the need to retain new counsel within a

reasonable time of the hearing. *See Mendoza-Mazariegos v. Mukasey*, 509 F.3d at 1082 ("Thus, when Mendoza was deserted by attorney Paek, his retained counsel, and requested a brief continuance so that his newly hired attorney Boachie-Yiadom could prepare to represent him, he was not requesting 'another' continuance, as the IJ suggested. Rather, having found himself abandoned by his retained attorney, Mendoza was trying to preserve his right to counsel.").

There is little doubt that Petitioners ability to present their claims was seriously hampered by the IJ's denial of a continuance. Petitioners had not been on notice that they needed to prepare and submit supporting documents, some of which had to come from Pakistan, until a week before the hearing. As a result, no documents were submitted on their behalf other than their asylum applications. *See Baires v. I.N.S.*, 856 F.2d at 93 (denial of continuance left alien "without any evidence to present at the hearing, other than his own testimony"). This lack of documentation was a stated reason for the denial of their claims, and an underlying reason for most, if not all, of the IJ's conclusions, including his credibility finding regarding Mr. Dada-- a central reason for the IJ's denial of Petitioners' applications.

While the IJ stated that if he deemed additional evidence to be necessary, a document submission date could be established, the IJ's statement was, in the end, merely an empty promise. It is clear from the IJ's decision that he deemed more evidence to be necessary, yet he failed to set a

document submission date. While the IJ found at the hearing that it was incredible that Mr. Dada would not have known that he had to submit documents based on his submission of prior immigration applications, the record indicates that most or all of those applications were aided by counsel- a fact that could have been documented if Petitioners had had the opportunity to submit documents. It appears that this determination was influenced by the IJ's overall credibility finding, which was clearly influenced by the lack of corroborating documents. [23]

While there is inconsistency among the courts as to when the denial of a continuance results in a denial of the right to counsel, several factors indicate that the IJ's denial of a continuance in this case violated that right. Petitioners were accorded one continuance to obtain counsel. Petitioners did so, thereby indicating their desire to be represented. *See Mendoza-Mazariegos v. Mukasey*, 509 F.3d at 1080 (clear that alien "did not want to proceed *pro se* from the fact that he brought another attorney to the hearing."). Although Petitioners at no point indicated a desire to proceed *pro se*, the IJ indicated that he would proceed on the case at the next hearing, with or without an attorney for Petitioners.[24]

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[23] The IJ's *post hoc* rationalization of his denial of the continuance seems the result of a self fulfilling prophecy.

[24] The notion that an IJ can force an alien in removal proceedings to give up the right to representation in this manner is deeply troubling.

Petitioners were represented by Mr. Shrestha at their hearing. However, due to the IJ's denial of a continuance, Mr. Shrestha had not had sufficient time to prepare for the hearing, nor had he been able to present any evidence on behalf of Petitioners. *U.S. v. Rojas-Contreras*, 474 U.S. 231, 240 (1985) (*Blackmun, J., concurring*) ("The constitutional right to assistance of counsel is rendered meaningless if a defendant is forced to trial in the absence of adequate time to prepare."). Thus, although an attorney was present at the hearing on behalf of Petitioners, they were deprived of their right to counsel because they were deprived of the benefits of being represented. *Baires v. I.N.S.*, 856 F.2d at 93 ("because of the immigration judge's inflexibility, Portillo Baires' attorney was deprived of a fair opportunity to prepare his case and Portillo Baires was left without any evidence to present at the hearing, other than his own testimony"); *Lin v. Ashcroft*, 377 F.3d at 1032 ("Lin's claim was prejudiced when, despite counsel's obvious lack of preparation of Lin's case, the IJ nevertheless allowed -- or perhaps compelled -- her to argue it almost extemporaneously.").

On the other hand, the interests cited by the IJ for not continuing the case were not sufficient to justify infringing on Petitioners' rights. The IJ stated that he set aside time for the hearing and had arranged for an interpreter. However, there is no indication in the record that the IJ could not have cancelled the interpreter prior to the hearing, as the request for a continuance was made six days before the hearing. Absent some evidence of cost or burden resulting from the cancellation of the interpreter six

days before the hearing, the fact that the IJ arranged for an interpreter does not justify denying a continuance. Similarly, although the IJ had set aside time for the hearing, and presumably would have difficulty scheduling another hearing in that time slot, this factor must be weighed against the important statutory and due process rights that the denial of a continuance would affect. *See Romero-Morales v. INS*, 25 F.3d 125, 130-31 (2d Cir. 1994) ("As the Supreme Court has noted, 'a myopic insistence upon expeditiousness in the face of a justifiable request for delay can render the right to defend with counsel an empty formality.'") (*quoting Ungar v. Sarafite*, 376 U.S. 575, 589 (1964)). The IJ's final contention, that these were expedited asylum matters, is simply a matter of case completion goals, which should not be controlling. *Hashmi v. AG of the U.S.*, 531 F.3d at 261.

The record indicates that Petitioners were prejudiced by the denial of a continuance. Given the violent political history of Pakistan, Mr. Dada's position in the PPP, and his association with Asif Ali Zardari (husband of recently assassinated PPP leader Benazir Bhutto, and himself subject to lengthy incarceration on false charges by the military and opposing political factions), as well as the attack on Mr. Dada and his arrest and detention under politically motivated circumstances, Petitioners have a colorable and facially meritorious claim for relief. Had they been afforded the opportunity to present their claim and be effectively represented by counsel, it is likely that the outcome would have been different.

Further, because the right to counsel and the right to a reasonable opportunity to present one's claim in removal proceedings are fundamental rights essential to due process, and because the issue is likely to recur, intervention of the Court is necessary to resolve the numerous inconsistencies in the decisions of the Courts of Appeals. Consistency in this area is essential to ensure that all aliens in removal proceedings, regardless of location, have the same protections from arbitrary, abusive or unlawful denials of their requests for continuances, and have adequate protections for their due process rights.

II. INTERVENTION OF THE COURT IS NECESSARY TO RESOLVE A CIRCUIT SPLIT OVER WHETEHR THE BIA CAN DENY A CLAIM BASED ON ADMINISTRATIVELY NOTICED FACTS WIHTOUT FIRST PROVIDING AN ALIEN NOTICE AND AN OPPORTUNITY TO REPOSND TO THOSE FACTS.

This case involves an issue of exceptional importance which has received inconsistent treatment within the Courts of Appeals. This issue is whether the BIA may deny an alien's claim based on administrative notice of facts outside the record without first providing the alien notice and an opportunity to respond to the noticed facts.

The BIA's regulations allow it to take administrative notice of "of commonly known facts such as current events or the contents of official documents." 8 C.F.R. § 1003.1(d)(3)(iv). "As with judicial notice, the common law counterpart of

administrative notice, properly noticed current events must be 'commonly known,'" *Burger v. Gonzales*, 498 F.3d 131, 134 (2d Cir. 2007) "not subject to reasonable dispute, and easily verifiable." *Chhetry v. U.S. DOJ*, 490 F.3d 196, 200 (2d Cir. 2007) (*citations omitted*). The courts have generally held that the BIA does not abuse its discretion by taking administrative notice of current events or changes in country conditions in an asylum applicant's homeland, even where the noticed facts may be dispositive. See *Burger v. Gonzales*, 498 F.3d at 134.

"The fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a meaningful manner." *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976) (*quotation omitted*). However, the courts are split over what constitutes sufficient notice and a sufficient opportunity to be heard when the BIA denies a claim based on noticed facts. While some courts have held that the BIA must first provide both notice and an opportunity to respond, others have held that the BIA's motion to reopen procedure provides an adequate remedy for an alien's whose case is denied based on noticed facts. See *Chhetry v. U.S. DOJ*, 490 F.3d at 200 (noting "a circuit split as to whether a petitioner's ability to file a subsequent motion to reopen cures a lack of notice.").

The Second Circuit has held that the BIA must provide an alien with notice and an opportunity to be heard before it denies an alien's claim. *Id.* The court has applied this holding to both motions to reopen and appeals. *Id.* The court has

found that notice and an opportunity to be heard is required because "the reopening procedure has serious limitations as a guaranty of due process." *Burger v. Gonzales*, 498 F.3d at 135. This is because the "BIA's decision to grant a motion to reopen is purely discretionary," *Id.*, and "because the filing of a motion to reopen does not automatically stay the execution of an order of removal." *Id.* Thus, an alien would have to apply to the BIA for a stay of removal, and in such a circumstance, "the applicant's due process rights depend entirely on the BIA's good faith" in granting the motion. *Id.* Further, in the case where the BIA has denied a motion to reopen based on noticed facts, a second motion to reopen may be statutorily barred by 8 U.S.C. § 1229a(c)(7)(A). *Chhetry v. U.S. DOJ*, 490 F.3d at 201. Despite finding that a subsequent motion to reopen is an insufficient procedural safeguard, the Second Circuit has held that the BIA is required to provide notice and an opportunity to be heard only when the noticed facts are the sole basis for the BIA's denial of a motion to reopen. *Jian Hui Shao v. Mukasey*, 546 F.3d 138, 168 (2d Cir. 2008).

The Ninth Circuit has taken a different approach based on the characteristics of the noticed facts. It has "held that notice of intent to take administrative notice of events occurring after the hearing is all that is required if extra-record facts and questions are legislative, indisputable, and general." *Circu v. Gonzales*, 450 F.3d 990, 993 (9th Cir. 2006) (*en Banc*) (*citations and quotations omitted*). "On the other hand, more 'controversial or individualized facts require both notice to the [alien] that administrative notice will be taken and an

opportunity to rebut the extra-record facts or to show cause why administrative notice should not be taken of those facts.'" *Id.* (*citations omitted*). For instance, and significant to this case, "an IJ may take administrative notice of a change of government, but where it is plausible that the change does not eliminate the danger to the individual petitioner, the IJ must give the petitioner an opportunity to be heard on the question of the individual impact." *Id.*

The Tenth Circuit has also found the motion to reopen process to be insufficient to protect an alien's due process rights. *De La Llana-Castellon v. INS*, 16 F.3d 1093, 1100 (10th Cir. 1994). Significantly, the court notes that motions to reopen are allowed only where there is new and previously unavailable evidence, and arguably do not allow an alien to rebut noticed facts based on evidence that was existing at the time of the decision. *Id.* The court also notes that "petitioners are entitled to full review of the record on direct appeal; reopening is a matter in the BIA's discretion." *Id.* This not only affects the scope of the BIA's review, but also the scope of review by the courts.

The Fifth, Seventh, and D.C. Circuits have all held that the BIA's motion to reopen process is sufficient to protect the rights of an alien without any additional notice or opportunity to address noticed facts. *See e.g. Gutierrez-Rogue v. INS*, 293 U.S. App. D.C. 338, 954 F.2d 769, 773 (D.C. Cir. 1992); *Rivera-Cruz v. INS*, 948 F.2d 962, 968 (5th Cir. 1991); *Sankoh v. Mukasey*, 539 F.3d 456, 466 (7th Cir. 2008) ("administrative notice does not violate the alien's due process rights because an

alien can challenge any factual finding through a motion to reopen.").

In a case such as the instant one, the BIA's denial of a motion to reopen based on noticed facts is particularly problematic, as the noticed facts are limited in nature, yet reflect upon emerging and complex conditions in a foreign country where an alien fears persecution. Petitioners submitted evidence that was material to their claim and specifically rebutted the IJ's finding that they lack a well founded fear of persecution. Specifically, Petitioners submitted evidence of the dissolution of the Pakistani government, the assumption of control under marshal law of that government by Musharraf, and the assassination of PPP leader Benazir Bhutto.

The IJ found that because the PML was elected in 2002, Pakistan no longer had a military government, and Petitioners no longer had a reasonable fear of persecution. The takeover of Musharraf and the assassination of Bhutto in 2007 unquestionably altered the state of affairs relied upon by the IJ. Because the IJ found that Petitioner's fear of persecution was at the hand of the military, and Petitioners' evidence showed that the military had taken control of the government, that evidence clearly demonstrated a change in conditions in Pakistan that was material to their claims. Further, as Mr. Dada claimed to be both a PPP member and a friend of Benazir Bhutto's husband, her assassination was clearly relevant to Petitioners claims.

While the noticed article indicate that Mr. Zardari had been elected president and formed a coalition government with Sharif, it also indicated that the coalition had collapsed, and the situation was unstable (the BIA failed to mention these facts in its decision). Thus, although the fact that there had been an election and Mr. Zardari had been elected was undisputed, there were other facts significant to Petitioners claims in the article that the BIA did not take notice of, and the significance of the noticed facts is far from undisputable. *See Getachew v. INS*, 25 F.3d 841, 846 (9th Cir. 1994) (while facts such as "which party has won an election in the immigrant's home country" might be indisputable, "[o]ther, more controversial or individualized facts, such as whether a particular group remains in power after an election, and whether the election has vitiated any previously well-founded fear of persecution, require more than mere notice. Such controversial or individualized facts require both notice to the applicant that administrative notice will be taken and an opportunity to rebut the extra-record facts."). *See also Burger v. Gonzales*, 498 F.3d at 135 ("The removal of a persecuting despot might vitiate an asylum applicant's well-founded fear of persecution, but in many cases lingering elements of a despot's regime may still pose a threat to an applicant's life and safety").

Notably, as Mr. Dada claims to have been attacked and detained on account of his PPP activities during the time that Sharif and the PML

were in power,[25] the fact that Sharif and the PML-N are part of the current government undermines the BIA's conclusion that Mr. Zardari's election obviates Mr. Dada's risk of persecution. Further, it is unclear whether Mr. Zardari, who was never cleared of corruption charges, is permitted to hold office under the Pakistani constitution. Also, as noted in Petitioners' motion to reopen, Mr. Dada was released from detention only after promising to testify against Mr. Zardari. There is no evidence that Mr. Zardari is aware that Mr. Dada falsely agreed to testify against him. Thus, it is not clear that Mr. Zardari is any guarantee of Petitioners' safety. The changes in Pakistan noted in the article relied on by the BIA have an effect on Petitioners' fear of persecution that is unclear at best.

Finally, as to the Second Circuit's finding that the noticed facts were not the sole basis for the BIA's decision, the facts were essential and dispositive. Not all of Petitioner's evidence was previously unavailable, but the evidence that was related directly to the changes Pakistan in 2007 and early 2008 was. But for the appearance of the noticed facts, that evidence could not be viewed as showing anything other than a material change in country conditions impacting Petitioners' eligibility for asylum. Petitioners were thus prejudiced by the BIA's notice of the new facts. *See Circu v. Gonzales*, 450 F.3d at 994-995 (prejudice shown where BIA

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[25] The IJ's contention that the military was in charge was partially mistaken. Officially, the PML and Sharif were in control, though it appears that this was only due to the support and aid of the military.

finds significant difference between record and noticed facts and relies on noticed facts).

CONCLUSION

In light of the truly substantial interests at stake for aliens in removal proceedings, the Court should grant certiorari to clarify the law regarding when an IJ's denial of a continuance is an abuse of discretion or violates an alien's right to counsel, right to present his claim, or right to due process. The Court should also grant certiorari to resolve the circuit split over whether the BIA can base its decisions on administratively noticed facts without first providing the alien notice and an opportunity to be heard on those facts.

Respectfully submitted,

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On the Petition

On Behalf of Petitioners

August 16, 2010

05-6291-ag (L); 08-5158-ag (Con)

BIA
Hom, IJ
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A095 980 071
A095 961 832
A095 961 841

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SUMMARY ORDER

Rulings by summary order do not have precedential effect. Citation to a summary order filed on or after January 1, 2007, is permitted and is governed by Federal Rule of Appellate Procedure 32.1 and this court's Local Rule 32.1.1. When citing a summary order in a document filed with this court, a party must cite either the Federal Appendix or an electronic database (with the notation "summary order"). A party citing a summary order must serve a copy of it on any party not represented by counsel.

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Daniel Patrick Moynihan United States Courthouse, 500 Pearl Street, in the City of New York, on the 21st day of January, two thousand ten.

PRESENT:

DENNIS JACOBS,
Chief Judge,
ROGER J. MINER,
PIERRE N. LEVAL,
Circuit Judges.

FAZAL MAHMOOD DADA, MOHAMMAD IBRAHIM DADA, AZEEM FAZAL DADA,

Petitioners,

V.

ERIC H. HOLDER, JR.,[1], UNITED STATES ATTORNEY GENERAL,

Respondent.

FOR PETITIONERS: Shahla Khan, New York, New York.

FOR RESPONDENT: Tony West, Assistant Attorney General Civil Division; Michael P. Lindemann, Assistant Director; Lyle D. Jentzer, Attorney, Office of Immigration Litigation, United States Department of Justice, Washington, D.C.

UPON DUE CONSIDERATION of these consolidated petitions for review of two Board of

[1] Pursuant to Federal Rule of Appellate Procedure 43(c)(2), Attorney General Eric. H. Holder, Jr., is automatically substituted for former Attorney General Michael B. Mukasey as respondent in this case.

Immigration Appeals ("BIA") decisions, it is hereby ORDERED, ADJUDGED, AND DECREED, that the petitions for review are DENIED.

Fazal Mahmood Dada, a native and citizen of Pakistan, seeks review of an October 27, 2005, order of the BIA affirming the August 3, 2004, decision of Immigration Judge ("IJ") Sandy Hom, which denied his application for asylum, withholding of removal, and relief under the Convention Against Torture ("CAT").[2] *In re Fazal Mahmood Dada, et al.*, Nos. A095 980 071/A095 961 832/A095 961 841 (B.I.A. Oct. 27, 2005), *aff'g* Nos. A095 980 071/A095 961 832/A095 961 841 (Immig. Ct. N.Y. City Aug. 3, 2004). Dada also seeks review of the BIA's September 24, 2008, order denying his motion to 2 reopen his removal proceedings. *See In re Fazal Mahmood Dada, et al.*, Nos. A095 980 071/A095 961 832/A095 961 841 (B.I.A. Sept. 24, 2005). We assume the parties' familiarity with the underlying facts and procedural history in this case.

I. Motion to Add Sons to Caption

Federal Rule of Appellate Procedure 15 requires that the petition "must name" each party seeking review either in the caption or body of the

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[2] Fazal Mahmood Dada was the lead petitioner before the agency. Accordingly, we refer exclusively to him throughout. Dada's oldest son, Muhammad Dada, filed an independent asylum application, which, because it relies entirely on the allegations in his father's application, was consolidated with Dada's case. Dada's minor son, Azeem Dada, applied for asylum as a derivative beneficiary of his father.

petition. Dada put only his own name on the petition for review, but added the phrase "et all" by hand. Terms such as "et al." are ordinarily insufficient. *See* Fed. R. App. P. 15. However, by using the phrase "et all," and also attaching the BIA's decision, which lists all three names and alien numbers, the petition effectively complied with the rule because his actions were "the functional equivalent of what the rule requires." *See Torres v. Oakland Scavenger Co.*, 487 U.S. 312, 316-17 (1988) (addressing Fed. R. App. P. 3, and finding that, "if a litigant files papers in a fashion that is technically at variance with the letter of a procedural rule, a court may nonetheless find that the litigant has complied with the rule if the litigant's actions were the functional equivalent of what the rule requires"); see also *Kowaleski v. United States Dep't of Labor*, 879 F.2d 1173 (3d Cir. 1989) (applying the Supreme Court's reasoning in Torres to petitions for review filed under Rule 15).

II. Petition for Review of Agency's Denial of Dada's Applications for Relief

We nonetheless deny Dada's petition for review challenging the BIA's affirmance of the IJ's denial of his applications for asylum, withholding of removal, and CAT relief. We review both the IJ's and the BIA's decisions. *See Yun-Zui Guan v. Gonzales*, 432 F.3d 391, 394 (2d Cir.2005). The applicable standards of review are well-established. *See* 8 U.S.C. § 1252(b)(4)(B); *see also Shu Wen Sun v. BIA*, 510 F.3d 377, 379 (2d Cir. 2007); *Salimatou Bah v. Mukasey*, 529 F.3d 99, 110 (2d Cir. 2008).

We lack jurisdiction to consider Dada's challenge to the agency's pretermission of his untimely asylum application. *See* 8 U.S.C. § 1158(a)(3) (explaining that no court shall have jurisdiction to review any determination of the Attorney General regarding the timeliness of an asylum application under section 1158(a)(2)(B)). Although we retain jurisdiction to review constitutional claims and questions of law, 8 U.S.C. § 1252(a)(2)(D), Dada raises no such argument, essentially disputing the IJ's determination that his delay in filing after the end of his lawful status was not reasonable.

With respect to Dada's applications for withholding of removal and CAT relief, we conclude that the IJ's adverse credibility determination is supported by substantial evidence. In finding Dada not credible, the IJ reasonably relied upon inconsistencies surrounding Dada's alleged arrest by Pakistani authorities. *See Diallo v. INS*, 232 F.3d 279, 288 (2d Cir. 2000). In light of those discrepancies, the IJ reasonably determined that Dada's failure to provide corroborating evidence further undermined his credibility. *See Biao Yang v. Gonzales*, 496 F.3d 268, 15 273 (2d Cir. 2007). Because the agency's adverse credibility determination was supported by substantial evidence, the agency reasonably found that Dada was unable to meet his burden of proof for withholding of removal and CAT relief. See Paul v. Gonzales, 444 F.3d 148, 156 (2d Cir. 2006); *Xue Hong Yang v. U.S. Dep't. of Justice*, 426 F.3d 520, 523 (2d Cir. 2005).

Furthermore, there was no abuse of discretion in the agency's denial of Dada's request for a continuance. *See Sanusi v. Gonzales*, 445 F.3d 193, 199 (2d Cir. 2006). Dada's case had been pending for over a year; Dada had ample time to prepare and obtain documents; his new counsel was on notice that the case was scheduled for a full merits hearing, an interpreter had already been arranged; and the IJ had continued the matter several times in the past. *See Morgan v. Gonzales*, 445 F.3d 549, 551-52 (2d Cir. 2006) (giving the agency wide latitude in declining to continue cases and finding that they abuse their discretion only when a denial is based on a legal or factual error or is otherwise outside the "range of permissible decisions").

III. Petition for Review of BIA's Denial of Motion to Reopen

We likewise deny Dada's petition for review of the BIA's denial of his motion to reopen, finding no abuse of discretion. *See Kaur v. BIA*, 413 F.3d 232, 233 (2d Cir. 2005) (per curiam); *Jin Ming Liu v. Gonzales*, 439 F.3d 109, 111 (2d Cir. 2006). The BIA properly considered the evidence Dada offered in support of his claim that country conditions in Pakistan had changed, and reasonably found that this evidence either failed to show a material change in country conditions or was previously available. See 8 U.S.C. § 1229a(c)(7)(C)(i)-(ii); *INS v. Abudu*, 485 U.S. 94, 104-05 (1988).

Dada argues that the BIA violated his due process rights by taking administrative notice of a change in country conditions without giving Dada an

opportunity to respond. However, there was no violation because that was not the sole basis for the BIA's rejection of his motion.*See Chhetry v. U.S. Dep't of Justice*, 490 F.3d 196, 198-99 (2d Cir. 2007); Shao v. Mukasey, 546 F.3d 138, 167-68 (2d Cir. 2008). There was no abuse of discretion in the BIA's denial of Dada's motion to reopen.

For the foregoing reasons, the petitions for review are DENIED. As we have completed our review, any stay of removal that the Court previously granted in this petition is VACATED, and any pending motion for a stay of removal in this petition is DISMISSED as moot. Any pending request for oral argument in this petition is DENIED in accordance with Federal Rule of Appellate Procedure 34(a)(2), and Second Circuit Local Rule 34(b).

FOR THE COURT:

Catherine O'Hagan Wolfe, Clerk

U.S. Department of Justice
Executive Office for Immigration Review

Decision of the Board of Immigration Appeals

Fall Church, Virginia 22041

Files: A95 980 071 – New York City
A95 961 832
A95 961 841

Date: Oct. 27, 2005

In re: FAZAL MAHMOOD DADA, a.k.a Fazal Dada Mahmood,
AZEEM FAZAL DADA
MUHAMMAD IBRAHIM DADA, a.k.a. Mohammad Dada

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENTS: Ramesh K. Shrestha, Esquire

CHARGE:

Notice: Sec. 237(a)(1)(B), I &N Act [8 U.S.C. § 1227(a)(1)(B)] –
In the United States in violation of law (all respondents)

APPLICATION: Asylum, withholding of removal, Convention Against Torture

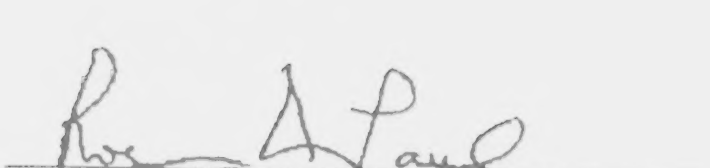
ORDER:

PER CURIAM. We will affirm the Immigration Judge's decision. First, we find no error in the Immigration Judge's conclusion that the respondents[1] are ineligible for asylum based upon a failure to file an asylum application within the 1 year filing deadline as the respondents were unable to establish any changed circumstances affecting their eligibility or extraordinary circumstances relating to the delay in filing an application (I.J. at 8-9); section 208(a)(2)(D) of the Act, 8 U.S.C. § 1158(a)(2)(D); 8 C.F.R. § 1208.4 (a) (2005). While the lead respondent entered the United States in 1997, he did not file until 2004, and he has not adequately explained why he waited so long to file (Tr. at 51-52). We also affirm the Immigration Judge's alternative determination that, even if the respondent's asylum application were considered, the lead respondent's testimony alone was not sufficient to sustain the burden of proving eligibility for asylum and the more stringent burden applicable to withholding of removal *See Diallo v. INS*, 232 F.3d 279 (2d Cir. 2000); *see also Qu v. Ashcroft*, 329 F.3d 140 (2d Cir. 2003). For example, the Immigration Judge noted

[1] The lead respondent's younger son, A95 961 841, is a derivative of his claim. His older son, A95 961 841 has filed a separate application for asylum, although his claim relies on the events upon which his father's claim for relief is based.

the discrepancy between the respondent's application for asylum and his testimony regarding his location when he was arrested (Tr. at 50; Exh. 2). The respondent's testimony was also contradictory with regard to the year in which he was arrested (Tr. at 39; 50). In addition, the Immigration Judge identified reasonably available corroboration that the respondent failed to provide. *See Qiu v. Ashcroft*, 329 F.3d 140, 153 (2d Cir. 2003) (holding that the adjudicator must identify missing relevant evidence and show that the evidence was reasonably available). The Immigration Judge identified reasonably available corroboration, such as evidence of the respondent's membership in the Pakistan's Peoples Party, which the respondent failed to provide. *See Qiu v. Ashcroft, supra*(holding that the adjudicator must identify missing relevant evidence and show that the evidence was reasonably available). We also note that while the respondent blamed his inability to recall specific dates and details of his claim on his ill health, he has submitted no medical records or other documentation which would support this claim.

Further, we affirm the Immigration Judge's finding that the evidence of record demonstrates a change in country conditions such that the respondent no longer has a well-founded fear of future persecution in Pakistan (I.J. at 14-165; Exh. 4) *See* 8 C.F.R. § 1208.13 (b)(2)(i). Finally, the Immigration Judge correctly concluded that the respondent failed to demonstrate eligibility for relief pursuant to the Convention Against Torture. Accordingly, the appeal is dismissed.


FOR THE BOARD

U.S. Department of Justice
Executive Office for Immigration Review

Decision of the Board of Immigration Appeals

Fall Church, Virginia 22041

Files: A95 980 071 – New York City
A95 961 832
A95 961 841

Date: Sep 24, 2008

In re: FAZAL MAHMOOD DADA, a.k.a Fazal Dada Mahmood,
MUHAMMAD IBRAHIM DADA, a.k.a. Mohammad Dada
AZEEM FAZAL DADA

IN REMOVAL PROCEEDINGS

MOTION

ON BEHALF OF RESPONDENTS: Shahla Khan, Esquire

APPLICATION: Reopening

This case was last before us on October 27, 2005, when we affirmed the Immigration Judge's August 3, 2004, decision denying the respondents'

application for asylum and withholding of removal, and request for protection under the Convention Against Torture.[1] The respondent's claim to asylum, withholding of removal, and protection under the Convention Against Torture derives from his claim that he was persecuted in Pakistan based on his political activities on behalf of the People's Party of Pakistan ("PPP"). As the Immigration Judge determined in his August 2004 decision, and we affirmed in our October 27, 2005, decision, the respondent failed to meet his burden of proof for asylum and withholding of removal based on the weaknesses in his testimony and the lack of adequate corroboration of his claim. We also affirmed the Immigration Judge's conclusion that the record demonstrated a change in country conditions since the time of the respondent's departure in 1997 such that he no longer had a well-founded fear of future persecution if returned to Pakistan. On May 7, 2008, the respondent filed a motion to reopen proceedings based upon a claim of changed country conditions in Pakistan. The motion is denied.

The respondent's motion is untimely, unless it falls within the exception allowing for filing a motion to reopen proceedings to apply or reapply for asylum,

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[1] The lead respondent's younger son, A95 961 832, is a derivative of his asylum claim. His older son, A95 961 841 filed a separate application for asylum, although his claim relies on the events upon which his father's claim for reliefwas based. References heretoafterto "the respondent" refer to the lead respondent.

or withholding of removal, based on changed circumstances arising in the country of nationality or in the country to which removal has been ordered, if such evidence is material and was not available and could not have been discovered or presented at the former hearing. 8 C.F.R. § 1003.2(c)(3)(ii)(2008); *see also Matter of C-W-L-*,24 I&N Dec. 346, 350 (BIA 2007); Matter of S-Y-G-, 24 I&N Dec. 247, 252 (BIA 2007). The motion must state the new facts to be proved and must be supported by evidentiary material. *Id.* Motions to reopen removal proceedings are disfavored in the interest of finality. *INS v. Doherty*, 502 U.S. 314, 323 (1992); INS *v. Rios-Pineda*, 471 U.S. 444, 450 (1985). The respondent's burden in connection with his motion to reopen is thus a heavy one, and is analogous to that of a criminal defendant who seeks a new trial on the basis of newly discovered evidence. *INS v. Abudu*, 485 U.S. 94, 110 (1988), *Cao v. United States Department of Justice*, 421 F.3d 149,156-57 (2d Cir. 2005). We conclude that the respondent's motion is outside the scope of this exception, and therefore we will deny the motion on the ground that it is time-barred.

The evidence of a change in country conditions that the respondent claims justifies reopening so that he can again pursue asylum, consists, inter alia, of affidavits from his brother and brother-in law in Pakistan attesting to the respondent's previous claim of persecution resulting from his role as the secretary general of the PPP in Karachi, Pakistan (Respondent's Motion, Tabs D, E). The respondent's brother describes his fear for the safety of his

children because of the increasing number of Islamic fundamentalists in Pakistan and his belief that his brother will be harmed if returned to Pakistan because of his PPP affiliation (Motion, Tab. D). His brother-in-law describes the fear his family experiences from both political party activists and Islamist fundamentalists in Pakistan (Motion, Tab E). The respondent has also submitted a letter from the General Secretary, District East, People's Pakistan Party, dated April 26, 2008, stating that the respondent has been a member of the PPP since 1995 (Motion, Tab F), and an affidavit from Dr. John Adams, Center for Asian Studies, University of Virginia (Motion, Tab G), and a number of 2007 and 2008 newspaper articles describing incidents of political violence and terrorist activity occurring in Pakistan (Motion, Tab H; Supplement to Motion to Reopen).

To the extent the respondent has submitted affidavits attesting to his role in the PPP and the harm he experienced while in Pakistan, and the letter attesting to his membership in the PPP, this information could have been discovered or presented at the respondent's former hearing, but was not. In addition, the affidavit from his brother and brother-in-law claiming that there is still "an open case" against the respondent because of his activities on behalf of the PPT does not prove a change in country conditions, inasmuch as during proceedings below, the respondent set forth the same unsubstantiated claim (Tr. at 42-44, 47). Continued police interest in him therefore is not a "change" in country conditions and will not support an exception to the time

limitations governing this untimely motion to reopen. In addition, the general statements by the affiants to their fear of Islamic fundamentalists is insufficient to justify plenary reopening.

The respondent claims changed country conditions in Pakistan, beginning with the suspension of the Chief Justice of the Supreme Court in March 2007 by President Pervez Musharraf, the state of emergency declared in November 2007, and the assassination of the former Prime Minister and Chairperson of the PPP, Benazir Bhutto on December 17, 2007. In support of this claim, the respondent has submitted with his motion an affidavit from Dr. John Adams, and a number of news articles describing the political crisis and violence that has occurred in Pakistan during the last calendar year (Motion at Tabs G, H, Supplemental Motion). However, we take administrative notice of country conditions in Pakistan that have occurred since the filing of the respondent's motion on May 7, 2008. Specifically, former President Musharraf resigned on August 18, 2008, in the face of impeachment charges, triggering the election on September 6, 2008, of the leader of the PPP, Asif Ali Zardari, the widower of Benazir Bhutto. *See* http://www.nytimes.com/2008/09/07/world/asia/07zardari.html. In light of these most recent developments in the political structure of Pakistan, which are directly related to the respondent's claim that he will be persecuted as a result of his activities on behalf of the PPP and his fear that his sons will be recruited for membership by Islamic fundamentalist groups, we find that he

has failed to show prima facie eligibility for relief based such that would merit reopening.

In conclusion, the respondent's motion to reopen will be denied because it was not filed within 90 days after entry of his final administrative order of removal and does not fall within any exception to that deadline.

ORDER: The motion is denied.

FOR THE BOARD

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
UNITED STATES IMMIGRATION COURT
New York, New York

August 3, 20041

File No.: A 95 980 071
A 95 961 832
A 95 961 841

IN REMOVAL PROCEEDINGS

In the Matter of:
DADA, FAZAL MOHMOOD
DADA, AZEEM FAZAL
DADA, MOHAMMED IBRAHIM

Respondents.

CHARGE: Section 237(a)(1)(B) of the Immigration and Nationality Act.

APPLICATIONS: Request for asylum in the United States pursuant to Section 208.
Request for withholding of removal under Section 241(b) (3) of the Immigration and Nationality Act, as amended.
Request for withholding of removal under the Convention against Torture.

ON BEHALF OF RESPONDENT: Ramesh Shrestha, Esquire
ON BEHALF OF DHS: Carol Moore, Esquire
Assistant Chief Counsel Immigration and Customs Enforcement

ORAL DECISION OF THE IMMIGRATION JUDGE

At a prior Master Calendar proceeding with the assistance of legal counsel the respondents had admitted to the truth of the factual allegations contained in their respective Notices to Appear. *See* Exhibit 1A, 1B, 1C. Having admitted to the truth of those allegations, the respondents had also conceded removability under Section 237(a)(1)(B) of the Immigration and Nationality Act.

As relief from removal the respondents have applied for asylum under Section 208 of the Immigration and Nationality Act. The respondents all rely upon one application submitted by the father in file 95 980 071, Exhibit 2A, the Form 1-589, received by the Court on March 19, 2004.

The respondents, as indicated by the Court previously and at the beginning of the proceedings, all rely upon this application, Exhibit 2A. Based upon the application and the fact that their claims are intertwined with that of the father respondent in 95 980 071, proceedings were consolidated and heard together. The respondents consist of the father, a son age 20, file 95 961 832; and also another son, age 21, who testified in these proceedings today in file 95 961 841.

The respondent was the lead applicant in these proceedings and, as noted by the Court, he had filed a Form I-589 request for asylum and withholding of removal. See Exhibit 2A. The respondents have also requested withholding of removal under the Convention against Torture in addition to withholding of removal under the Act.

The first witness was the father himself. He had testified that he was born in Karachi. He is married. He has three children. He earned a Bachelors of Science degree in 1976. He also testified that he operated his family business which consisted of various enterprises in Pakistan. The respondent father also testified in 1995 he joined the MR. STENDER TO JUDGE or the Pakistan People's Party and became the general secretary of the central zone in Karachi. The respondent gave a brief history as to the MR. STENDER TO JUDGE and its leader, Mr. Bhutto. He also indicated a succession of leaders of the MR. STENDER TO JUDGE and indicated that he himself had difficulties as a member of the MR. STENDER TO JUDGE.

He indicated that in 1996, when Ms. Bhutto had been removed from office, he experienced problems with the government. He indicated that an unknown truck or an anonymous person had fired a gun shot at him, but he was able to escape any harm. He indicated that it took place in 1996, then later in his testimony in 1997, but then further indicated that he was unable to recall given some illness or memory lapse that he has suffered as a result of shingles, as best as could be determined by the Court. The respondent indicated that he is

suffering both physically and mentally as a result of this.

The respondent father had also testified that the MR. STENDER TO JUDGE was in power at one point, but then at one point the Muslim League had come into power in February of 1996, and he had been arrested and detained for a three day period. He was unable to recall the date but he indicated that he was able to secure his release after he had promised to testify against a MR. STENDER TO JUDGE member. He indicated that upon his release he had remained in Pakistan for approximately two to three months and then was able to depart using a visa that he had obtained previously. He indicated his main reason for departing was not to give false testimony against his friend, and also to avoid any further difficulty with the authorities.

The respondent had also testified that he did not apply for asylum previously because he was seeking a labor certification, which is pending, and seeking to adjust his status based upon that certification if it is approved. He also he attempted to extend his business visa and then secure his permanent resident status.

Respondent father also testified he was unable to return to his country because of the manner and method of his departure, that he had fled because the authorities were seeking his whereabouts. He felt that he would be detained, and he also indicated he would be jailed upon his return.

Respondent father also indicated that he did not provide any documentation to support his case, but he will try to get such documents if given an opportunity to do so.

The next witness was that of the oldest son who indicated that he had departed at the same time as his parents to come to the United States, and also to continue his studies here. The son had also indicated that the father was engaged in business while he was in Pakistan and also in politics. He had heard from family members that his father was involved in the MR. STENDER TO JUDGE, and he was also told by his mother that he had undergone difficulty, had been detained for a three day period, but was unable to recall or recount from any personal knowledge and based upon information provided to him. The son had also indicated that he is not sure whether his father could return to Pakistan.

The third son is present in Court. He was not a witness to testify as to events. Counsel has indicated that he may have been too young at the time.

STATEMENT OF THE LAW

A respondent who is seeking a discretionary grant of asylum must demonstrate status as a refugee as defined by Section 101(a) (42) of the Immigration and Nationality Act. That definition includes the requirement that the respondent demonstrate an unwillingness or inability to return to his or her home country because of persecution or

a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion. The requirement is met by a showing of circumstances under which a reasonable person would fear persecution.

Accordingly, in determining whether the respondent is eligible for asylum the respondent's subjective mental state must be considered against the background of circumstances prevailing in the respondent's home country. In some cases, the only available evidence of the respondent's subjective fears may be the respondent's own testimony. Such evidence can suffice where it is believable, consistent, and sufficiently detailed to provide a plausible and coherent account of the basis of the respondent's fears. This does not translate to mean the introduction of supporting evidence is merely at respondent's option. Generally, when such evidence is available it must be provided.

Finally, not just any fear of persecution will suffice to sustain the respondent's burden. The objective reasonability of persecution on account of the grounds specified in Section 101(a) (42) of the Act, and the respondent's subjectively reasonable fear of experiencing that persecution, both must be established. In addition to establishing eligibility for a grant of asylum, a respondent has the burden of establishing that a favorable exercise of discretion is warranted. The respondent also bears the evidentiary burden of proof and burden of persuasion in applications for asylum and for withholding of removal.

A respondent who is seeking withholding of removal from any country must show that respondent's life or freedom would be threatened in such country on account of race, religion, nationality, membership in a particular social group, or political opinion. In order to make this showing, the respondent must establish a clear probability of persecution on account of one of the enumerated grounds. This clear probability standard requires a showing that it is more likely than not that the respondent would be subject to persecution.

With regard to withholding of removal under the Convention against Torture, here the respondent needs to demonstrate that it is more likely than not that the respondent would be subject to torture upon his return.

FINDINGS OF FACT

Based upon the evidence provided to the Court, which included the oral testimony of two of the respondents and the I-589, Exhibit 2A, the Court makes the following findings of fact:

The respondents are all natives and citizens of Pakistan. The respondent father is forty-nine years of age. The oldest son is twenty-one years of age, and the youngest son is twenty years of age. All three of the respondents had come to the United States on July 6, 1997. They all appear to have had a visa to come, and that visa gave them permission to remain until January 5, 1998. *See* Exhibit 2A.

Both respondents, the oldest son and the respondent father, had filed a request for asylum on Form I-589, *See* Exhibit 2A and also Exhibit 2C in the respective files, on March 19, 2004.

The respondents have a major obstacle to their request for asylum. The Immigration and Nationality Act and the regulations indicate, in 8 C.F.R. Section 1208.4 and also in the Immigration and Nationality Act, as amended, Section 208.4, that the respondents need to demonstrate with clear and convincing evidence that they had filed their requests for asylum within one year from the date of arrival. The respondents arrived in the United States on July 6, 1997 with a visa to come to the United States, with permission to remain until January 5, 1998. This is indicated in their travel documents, and based upon the testimony heard by the court by two of the respondents.

The Court also notes that the respondents both had filed their requests for asylum, Exhibit 2A and 2C, on March 19, 2004. Clearly, the application is beyond the one year time limitation for filing of such applications. Even taking the January 5, 1998 date as the last date for filing, their application being filed on March 19, 2004 is way beyond the one year period. The Court had heard no testimony concerning the fact that the respondents fell within any of the exceptions set forth in the regulations for a late filing. The regulations also indicate for that exception to apply that the respondents need to file within a reasonable time after the failure to file within the one year period of time, and within any of those exceptions set forth in 8 C.P.R. Section 1204.4.

The Court finds that the respondents' request for asylum under Section 208, particularly with regard to the father respondent, and with respect to the two sons, it is time-barred under the Act and under the regulations. The two sons, one is twenty years of age and he relies upon Exhibit 2A; and the other individual, twenty-one, had filed his application given his majority under the Immigration and Nationality Act, reaching twenty-one, but primarily relies upon the events and circumstances relating to his father.

There is no independent claim. So, both of the respondents, in terms of their applications, rely upon the circumstances and the events undercutting or underlying the father respondent's application before the Court. And since that is the case, it would appear that the sons' applications are equally barred under the same basis as the father under the Act and under the regulations as well. Also, the sons rely upon the events and circumstances that occurred to the father, which predated their arrival here in 1997.

So, it is the finding of the Court that the respondents' applications for relief under Section 208 is time-barred.

In the event the Board of Immigration Appeals or a subsequent Federal Court determine that the respondents are entitled to consideration of asylum, the Court will make that determination at this time.

ANALYSIS BY THE COURT

The respondent father, who is the lead applicant in this matter and whom the sons primarily rest their claim for asylum, the father indicates that he has suffered both past persecution and has a well-founded fear of future persecution due to his association, affiliation, and membership in a political organization known as the Pakistan People's Party.

It is the opinion of the Court that the respondents do not merit relief of asylum under Section 208 as the claim was substantially inconsistent and materially conflicting. I will address that aspect in a moment, but there are also several other factors which are adverse to the respondents' claim for relief under Section 208. The Court will address that as well.

Let me go to the credibility factor in the respondents' application. The Court found it to be inconsistent with respect to the written application that had been submitted with 2A, and the oral testimony heard by the Court. This is primarily with respect to the respondent father. In his written application he indicated that he was arrested by the police when he was leaving a rally. In his oral testimony he indicated that he was attending a party meeting. In his further testimony he indicated that he had been attacked. However, the respondent had not provided the correct date nor the correct circumstances in which the attack had taken place, when compared with his written application versus his oral testimony on open Court.

The respondent acknowledges to a certain extent that he is unable to recall any of the dates that these events had taken place, and these are the two primary events that he relies upon, his attack and his arrest by the authorities. It is clear to the Court that the respondent's inability to recall undermines to a certain degree his testimony in that it certainly requires, in the opinion of the Court, corroboration and verification. In the respondent father's presentation and also in the son's as well, there is no corroborating documents whatsoever.

The respondent had offered as a means of an explanation that his prior attorney did not advise him and that he was unaware as to what that process is in asylum to document his case. However, the Court did not find his explanation to be credible, convincing, or even believable. The respondent father is an educated man. He has a Bachelor of Science degree in 1976 that he earned, and he had also testified that he was able to obtain a visa to come to the United States as a business person. He had operated his family business which involved many enterprises, given his testimony. And he had also applied for a labor certification while here in the United States. His testimony that he was unaware of the documentary requirements with regard to his case for asylum is not credible and it is certainly contradictory his status as an educated individual who is a business person and has had prior dealings with obtaining a visa and applying for a labor certification while here.

His failure to provide corroborative materials to his weak testimony certainly undermines his

claim, and the inconsistencies with regard to the material elements, the substantial or the essence of his claim, the attack and the arrest, undermines his credibility before the Court concerning his claim of past persecution.

The respondent had also indicated that he had fled when he came to the United States in 1997, and separate and apart from the limitation or the time-bar issue, respondent did not file his application for relief until March of 2004. Certainly, this undermines and undercuts his claim that he had fled because of persecutory reasons. The explanation that he had also offered in this regard, which he said was a very good one, is certainly not a very good one in the opinion of the Court. It is certainly not responsive, it was not germane, and it was not within any of the exceptions set forth in 8 C.F.R. Section 208.4 with regard to an untimely filing of a request for asylum. But given the length of time between his arrival here in the United States, with permission to remain until January of 1998, and failing to file until March of 2004 certainly undermines and undercuts his claim of persecution.

The respondent father asserts that one of the major factors in his request for relief was that he was attacked by an anonymous person or an unknown truck. He had reported the incident to the police but nothing had been done, or they did not wish to take his report. The lack of criminal prosecution in a particular matter is not a basis to grant relief under Section 208. But more so with regard to the lack of consistency in the respondent's presentation and the inconsistent testimony and the

inability to recall the date of incident certainly undermines his claim that the event had taken place.

The respondent, with regard to his inability to recall, asserts that he is suffering from a physical or a medical abnormality and that he is suffering or he is mentally upset as a result of this medical reason. He indicated that because of this he is unable to recall with any specificity the dates that he relies upon for his persecution claim. But here again, the respondent provides no evidence, or no medical records, or hospital documents, or doctor's statements or reports concerning his physical or medical problems, and this would certainly be easily obtainable since the respondent indicates that he is suffering from this situation while here in the United States. He provides none of this in support of his memory inability or to explain why he is unable to recall the dates of the events that he relies upon for his request for asylum.

It is also the opinion of the Court that an anonymous attack by one individual is not past persecution, and certainly does not rise to a level of a well-founded fear of persecution based upon the presentation made by the respondent.

The Court had also noted, based upon the background material that had been provided by the Government, Exhibit 4, the Department of State Country Reports on Human Rights Practices for 2003, there has been certainly a substantial change in circumstances. There is a new government that is in existence in Pakistan, and respondent's

explanation of why he is unable to return was not credible or convincing to the Court. He indicates that the government there, a military government, does not want any democracy to occur. However, that is contrary to the fact that the government did permit elections in 2001 in Pakistan, which, based upon the view of observers, is considered to be fair and fundamentally sound. This certainly is contradictory to the respondent's claim that the government does not want democracy or the voice of the people in its rule.

But more importantly, this change in government, the respondent was unable to explain how that would affect his ability to return back to his country. The respondent had also noted that being a member of the MR. STENDER TO JUDGE he was unable to get documentation and he would try his level best to do so since the government is in exile in London, and that there is no MR. STENDER TO JUDGE here in the United States. As best that could be determined from the background material, Exhibit 4, the MR. STENDER TO JUDGE is a visible and an open and active political party that exists in Pakistan. And the fact that the respondent is unable to get any verifiable corroboration of his party membership or his party activities while he was there certainly undermines and undercuts his claim of persecution.

It is the opinion of the Court that the respondent's application for asylum is time-barred, but more importantly, on its merits respondent has failed to demonstrate eligibility for asylum. The Court did not find it to be credible or believable. It

found it to be inconsistent and contradictory. And given the weak nature of the presentation, the absence of any corroboration certainly undermines the respondent's claim for relief under Section 208 as well.

It is also the opinion of the Court that the respondent has failed to meet the higher burden of proof necessary for withholding of removal under the Act; and the respondent has not demonstrated that it is more likely than not that he would suffer torture upon his return. The respondent has failed to meet his burden of proof and burden of persuasion with regard to withholding of removal under the Convention against Torture.

Accordingly, the following orders will be entered:

IT IS HEREBY ORDERED that respondents' request for asylum is time-barred;

In the event that the Board of Immigration Appeals or a subsequent Federal Court determine that the respondents are entitled to consideration of asylum, it is the finding of the Court that the respondents' application for 208 relief is denied;

IT IS FURTHER ORDERED that respondents' request for withholding of removal under Section 241(b) (3) of the Immigration and Nationality Act is denied;

IT IS FURTHER ORDERED that respondents' request for withholding of removal under the Convention against Torture is denied;

IT IS FURTHER ORDERED that the respondents be removed from the United States to Pakistan pursuant to Section 237(a) (1) (B) of the Immigration and Nationality Act.

SANDY HOM
Immigration Judge

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
UNITED STATES IMMIGRATION COURT
NEW YORK, NEW YORK

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In the matter of

DADA, Fazal Mahmood,
A95-980-071
DADA, Azeem Fazal,
A95-961-832
DADA, Muhammad Ibrahim,
A95-9610841,

Respondents.

---x

Date: July 29, 2004
REMOVAL PROCEEDING

On behalf of Respondents
Ramesh K. Shrestha, Esq.
377 Broadway, Suite 801
New York, New York 10013

On behalf of DHS
No Appearance
Assist. Chief Attorney
New York District, BICE

DECISION ON REQUEST FOR CONTINUANCE

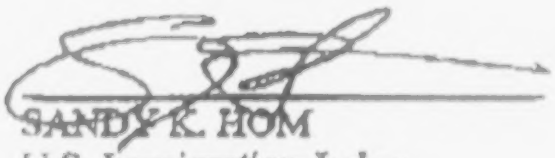
Respondents, by their attorney, filed on July 27, 2004 a written motion for continuances. The

Dept of Homeland Security ("DHS") submitted no reply to the motion. For the reasons stated below, the motion is denied.

This case is scheduled for an individual merit's hearing for Aug 3, 2004 at 10:30 a.m. These cases has been pending since April, 2003 and respondents have had more than ample time to prepare and obtain documents for their hearing. Moreover, these cases are expedited asylum matters. If at the conclusion of the hearing and the court deems additional evidence is necessary, then an evidence submission date can be established for the submission of additional materials.

As for counsel unavailability, the court is not sympathetic to the counsel situation since he was on notice that these cases have been scheduled for a full merits hearing. The court has set aside the time and arranged to have the language interpreter present for the hearing. If counsel knew that there was a conflict, then counsel should have declined to represent the respondents due to his prior commitment to other matters and his unavailability to proceed. Additionally, noted previously on written notices to the respondents, the court has been extremely patient and has continued the matters several times based upon prior counsel's unavailability due to illness. The court informed respondents at the last hearing date that it will proceed without counsel. If respondents desired legal counsel for their hearing, then they were put on notice to secure counsel in sufficient time for the hearing. Consequently, there are no valid reasons to continue the matter.

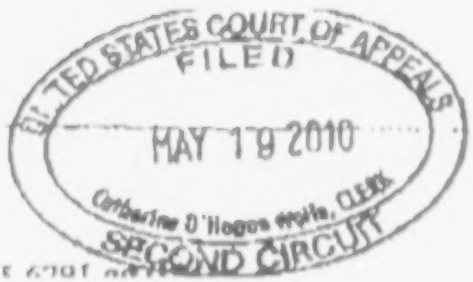
IT IS ORDERED that the request fur a continuance in the above captioned matters is denied and respondents are required to appear as scheduled for a hearing on Aug 3, 2004 at 10:30 a.m., Courtroom #23, 12th floor, 26 Federal Plaza, New York, NY 10278.



SANDY K. HOM
U.S. Immigration Judge

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Daniel Patrick Moynihan United States Courthouse, 500 Pearl Street in the City of New York, on the 19th day of May, two thousand ten.



Docket No. 05-6291-ag(L)
08-5158 (con)

FAZAL MAHMOOD DADA, MOHAMMAD IBRAHIM DADA, AZEEM FAZAL DADA,

Petitioners,

v.

ERIC H. HOLDER, JR.,[1] UNITED STATES ATTORNEY GENERAL,

Respondent.

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[1] Pursuant to Federal Rule of Appellate Procedure 43(c)(2), Attorney General Eric H. Holder, Jr., is automatically substituted for former Attorney General Michael B. Mukasey as respondent in this case.

Fazal Dada, Muhammad Dada and Azeem Dada having filed a petition for panel rehearing, or, in the alternative, for rehearing *en banc*, and the panel that determined the appeal having considered the request for panel rehearing, and the active members of the Court having considered the request for rehearing *en banc*,

IT IS HEREBY ORDERED that the petition is denied.

FOR THE COURT:
Catherine O'Hagan Wolfe, Clerk